SERVED: July 31, 1996

NTSB Order No. EA-4472

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 23rd day of July, 1996

ROBERT SCOTT, JR., Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	)	Docket No. 186RM-EAJA-SE-11778

OPINION AND ORDER

Applicant (also "respondent") appeals the law judge's denial of his Equal Access to Justice Act (EAJA) application, filed pursuant to 5 U.S.C. 504 and our rules at 49 C.F.R. 836.[1] The

[1] The Administrator has replied in opposition to the appeal. Applicant does not argue that this reply not be considered, but at various points in his appeal challenges the Administrator's allegedly unauthorized response to the brief applicant filed in response to our remand order, EA-4274, served November 30, 1994. Applicant is correct that, when we remanded this case for further EAJA processing, we did not contemplate an additional filing by (continued…)

law judge held that applicant was not entitled to recovery of approximately $31,000 in fees and expenses because he incurred no obligation to pay his representative, attorney assistants, and experts, and did not qualify for a judicially-developed exception that allows payment for certain pro bono work. The law judge also reviewed the EAJA application on the merits, and concluded that, were applicant entitled to recover under EAJA, the hourly rate billed by his non-attorney representative was too high, certain fees and expenses should be disallowed, and time spent on various tasks was unreasonable and should be reduced.[2]

We commend the law judge for his thorough study and analysis, which has contributed greatly to our conclusion. However, based on the additional information provided us in applicant's appeal brief, we must disagree with the law judge's finding that applicant is not entitled to EAJA recovery, and we address this issue first.

1. Contingency fees and EAJA. EAJA provides for recovery of "fees and other expenses **incurred**." (Emphasis added.) When the Board remanded this case for calculation of an EAJA award, applicant was authorized to submit a response to new arguments

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the Administrator. Nevertheless, it was within the law judge's discretion to accept such a pleading and others (see initial decision served May 2, 1995) and, in fact, had the law judge seen the need, he could have required the filing of further briefs.

[2] The law judge's decision, served May 2, 1995, is cited here as the "EAJA decision."

offered by the Administrator in his reply to applicant's appeal. (Id. at 9. The Administrator added claims that fees were not allowed for work done prior to the order of suspension, and that expert witness fees and applicant's representative's hours and fees were excessive.)

In response, applicant indicated that he was not charged for any services in connection with this case. As the law judge noted (EAJA decision at 2), in the December 29, 1994 filing on remand, applicant stated:

> None of the persons who performed services on Captain Scott's behalf charged him for those services. With regard to the attorneys provided by the Air Line Pilots Association, those services were paid for in the form of salary by the membership of the union. With respect to Captain Scott's other representative (Robert Konop) and his experts (Kevin Daisey and Paul Lyon), all provided those services on their own time and at their own expense.

Applicant also stated:

> There is no importance which could or should be attached to the fact that Captain Scott was not billed, did not pay for the services which he received, or that those involved in his defense did not charge him for those services. The provisions of the Board's Rules and the EAJA require payment at the rates "customarily" charged.

Id.

Applicant offered this information in response to the Administrator's claim that the level of fees was too high. The Administrator had not, to this point, argued that applicant incurred no costs and therefore was not entitled to EAJA recovery. However, applicant's statements were read by the law judge and they raised, in his mind, the fundamental question of whether fees could be awarded when an individual was not charged

for representation and was under no apparent obligation to pay for that representation.

On appeal from the law judge's decision, applicant now offers more clarifying information. He states that a contingency fee arrangement existed, and provides the terms of that arrangement. We, thus, now have available to us information that was not before the law judge -- information that we have determined to consider because we think it raises an important issue of policy extending far beyond this case.[3] Mr. Konop, applicant's non-attorney representative, now explains that, if EAJA recovery occurs, Captain Scott has agreed to pay fees and expenses up to the awarded amount. See Konop Affidavit, Addendum D to "Applicant's Second Appeal," dated May 26, 1995, at D-6 and D-7.[4]

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[3] This material is new evidence, but the Administrator does not argue that it should be stricken.

[4] The following paragraphs from the affidavit summarize the terms of representation:

> 17. Third, time that I [Konop] put in to the case, beyond that which Captain Scott might be able to put into his own defense, would be offered by Captain Scott to others involved in aviation enforcement litigation. It was expressed and implied that, where he was able, Captain Scott would act as an investigator or expert witness in cases brought against other airman [sic], irrespective of my involvement in such cases. Such services would be offered by Captain Scott on a 'pro bono' basis.
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> 18. Fourth, by express and implied agreement, Captain Scott committed to the payment of fees and expenses in the case to the degree which such fees and expenses might be recovered under the provisions of the Equal Access to Justice Act. Captain Scott agreed to this to the extent that he was certain that the FAA's action against him was not

(continued…)

This information raises two immediate questions. First, may we reasonably rely on Mr. Konop's statements regarding the alleged contingency fee arrangement? Second, is there a legal or policy bar to granting EAJA fees in the context of contingent fee arrangements?

As to the first question, the Administrator suggests that this information is not credible. While we could remand this issue to the law judge for a determination of Mr. Konop's credibility in making these statements at this time, we see no need to do so. We think it is eminently reasonable to assume that, were they aware of its availability, respondents and their attorneys/representatives would uniformly agree to contingent pay arrangements in appropriate circumstances. Accordingly, we will assume that applicant and Mr. Konop had the arrangement Mr. Konop has described.[5]

The second question raises much more difficult issues. There is no direct statutory prohibition against contingency fee

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substantially justified, and to the extent that he agreed to make compensatory time available to other airman (as described above) to whatever degree I would be required to expend my own time and effort.

[5] The Administrator suggests that Mr. Konop created this "agreement" only afterwards, to respond to the law judge's decision. As noted, we believe the appropriate course is to assume the existence of a contingency fee arrangement. Further, the Administrator's attempt now to portray this issue as something Mr. Konop should have clarified earlier is belied by the Administrator's own failure earlier to argue that applicant's apparent lack of liability for representation costs merited outright dismissal of the application.

arrangements in the agency EAJA statute, 5 U.S.C. 504, and we have located no case under that statute dealing directly with the question before us. There are, however, a number of circuit court decisions exploring the issue of contingency fees and other payment arrangements for judicial proceedings under related fee-shifting statutes that are informative.

Title 28 U.S.C. 2412, an EAJA-type statute governing civil actions brought by or against the United States, provides for recovery of "fees and other expenses . . . incurred by [a prevailing] party." One case is especially illustrative.[6]

In Phillips v. General Services Administration, 924 F.2d 1577 (Fed.Cir. 1990), an attorney accepted $2500 from a client for prior work performed, with the express understanding that, for contemplated future work, if there were a recovery under EAJA, the client would give all the award to the attorney. The United States, on behalf of the defendant agency, argued that the client was entitled only to $2500 EAJA recovery: what she had paid and was obligated to pay. The court concluded instead that the client "incurred" fees in the amount of whatever award was made. The court stated (924 F.2d 1582-1583):

[W]e construe the fee arrangement between Phillips and her

[6] The law judge offers a thorough review of this case law, and his conclusions are not inconsistent with ours. Instead, they proceed from a different premise: that Captain Scott was under no obligation to his representatives. With the contingency agreement before us, our conclusions are different from those of the law judge because the facts before us have changed.

> attorney to mean that if an award of attorney fees is obtained on her behalf she is obligated to turn it over to her attorney. In this sense, Phillips incurs the attorney fees that may be awarded her. On the other hand, if no fee award is made to her, she does not have any obligation to pay any further fees to her attorney from her own resources. . . . Inherent in the agreement is an intention on the part of Ms. Phillips to be obligated to her counsel for fees properly obtainable under the statute. Moreover, the policy of the statute is to pay non-enhanced fees for legal services actually rendered. . . . Further, we hold that to be "incurred" within the meaning of a fee shifting statute, there must also be an express or implied agreement that the fee award will be paid over to the legal representative.
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> S.E.C. v. Comserv Corp., 908 F.2d 1407 (8th Cir. 1990),

discusses the policy of fee shifting. In that case, an employee of Comserv was the prevailing party, the employee and Comserv had agreed that Comserv would assume all legal expenses, and Comserv's insurance company was obliged to reimburse Comserv. The employee was found not to have incurred any legal expenses because he was not obliged to pay. The court noted:

> The central objective of the EAJA, and of section 2412(d)(1)(A) in particular, was to encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses. Achievement of that end, it was believed, would promote three more general goals. First, Congress hoped to provide relief to the victims of abusive governmental conduct, to enable them, to vindicate their rights without assuming enormous financial burdens. Second, it sought to reduce the incidence of such abuse, and it anticipated that the prospect of paying sizable awards of attorneys' fees, when they overstepped their authority and were challenged in court, would induce administrators to behave more responsibly in the future. Third, by exposing a greater number of governmental actions to adversarial testing, Congress hoped to refine the administration of federal law -- to foster greater precision, efficiency and fairness in the interpretation of statutes and in the formulation and enforcement of governmental regulations.

Comserv at 1415, citing Spencer v. NLRB, 712 F.2d 539, 549-550

(D.C. Cir. 1983). See also League of Women Voters of California v. F.C.C., 798 F.2d 1255 (9th Cir. 1986).

Finding that a contingency fee arrangement does not prohibit EAJA recovery and that one existed here obviates many of the issues the law judge addressed. However, two of those issues merit some comment. First, the law judge's conclusion that the Board's rule, at 49 C.F.R. 826.6(a), is inconsistent with the statute and interpretive case law and therefore should not be followed requires comment. That rule authorizes EAJA awards "even if the services were made available without charge or at a reduced rate to the applicant." The law judge's review of the history of that rule through the Administrative Conference of the United States' Model Rules is accurate. However, the Administrative Conference also acknowledged the issue of possible recovery of fees by those who incurred no obligation to pay (such as pro se litigants), and chose to leave that question unanswered. The model rule left the issue open for the agencies to apply. The authorization in the model rule (which we adopted) to recover for services provided without charge, furthermore, reflects past and current case law, as discussed above and, in any case, may not be waived by a law judge.

Second, and although we share the law judge's concerns, in general, we do not think an EAJA award here equates to an inappropriate "windfall" to Captain Scott.[7] While that might

[7] EAJA requires that the award go to the individual; it may not go directly to counsel.

have been the case were he not obligated under a contingency fee arrangement, that arrangement removes any windfall by providing that applicant forward any award to counsel (or agent) (as Phillips requires). Thus, his representatives can receive some measure of recovery for their efforts. Accord Blanchard v. Bergeron, 489 U.S. 87 (1989).

Overall, it is clear that the courts have, through various mechanisms, created a body of law that permits fee shifting when doing so will reduce economic deterrents faced by individuals who wish to vindicate their rights as against the government. Our decision is consistent with these principles.

Having determined that applicant is not precluded from recovery, we turn to the various other errors applicant ascribes to the law judge's alternative findings.

2. Propriety and reasonableness of the sought fees and expenses.

a. Mr. Konop's hourly rate. The law judge concluded that the statutory fee guidance (a maximum rate of $75/hour, as increased by the Consumer Price Index, see 49 C.F.R. 826) applied only to attorneys, and that non-attorney representatives should receive a lesser hourly rate because EAJA-type statutes, including 5 U.S.C. 504, differentiate between attorneys and agents. For the period in which Mr. Konop was applicant's representative, the law judge adopted an hourly payment rate equal to 75 percent of the maximum authorized.

We agree with the law judge that fee awards must be based on

customary, prevailing market rates, and may not exceed those amounts even if the maximum permissible rate is higher. Nevertheless, we do not read 5 U.S.C. 504 as precluding application of the maximum amount to non-attorney representatives, provided the other conditions are met. The relevant statutory language of § 504(b)(1)(A) provides that:

> "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.) (Emphasis added.)

If the non-attorney's time is excessive, the correcting approach is by way of adjustment in the authorized hours, not the fee rate, if that rate is the "prevailing market rate for the kind and quality of the services furnished."

We agree entirely with the law judge's comment that the application does not establish the prevailing market hourly rate for non-attorney representative services, nor do Mr. Konop's submissions regarding his background and experience. See Hensley v. Eckerhard, 461 U.S. 424 (1983); Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988). It was applicant's responsibility to offer such proof, and he failed to do so, even on appeal here. Under the circumstances, the law

judge's adoption of 75% of the maximum allowable to attorneys is a reasonable estimation. Applicant's appeal in this regard is, therefore, denied.

Applicant also asks that fees be enhanced to reflect, for all years, the hourly rate available in the year of the Board's final order. This request is denied. Title 5 U.S.C. 504 was not intended to guarantee that award recipients be made whole. Pierce v. Underwood, 487 U.S. 552 (1988). Moreover, the grounds cited for the enhancement -- delay in the proceedings -- could produce enhancement in every case. Applicant has not shown any exceptional delay in this case.[8] Further, cost of living increases (i.e., inflation) have already been incorporated into the maximum hourly rates through the Board's amendment to Part 826 raising the maximum allowable rate (and applicant's hourly recovery) to reflect the Consumer Price Index. See also Pierce, supra at 574 (contingency agreement is not a special factor warranting enhancement of fee award).

b. Awarded hours. The law judge concluded that the hours claimed for Messrs. Konop, Lyon, and Daisey (the latter two his technical experts) were excessive and reduced them.[9] A

[8] The court in Hirschey v. F.E.R.C., 777 F.2d 1 (D.C. Cir. 1985), chose to apply the most current cost-of-living adjusted ceiling to all years' fees to compensate for a delay caused by "a paperwork error in the Court Clerk's office" that "greatly delayed" consideration of the fees claim (id. at 2).

[9] The law judge also excluded outright those hours that were expended by Mr. Konop and others prior to instigation of these proceedings before the Board. As the law judge correctly noted, representation prior to the Administrator's issuance of an order (continued…)

determination of hours reasonably expended is largely a subjective process. One of the oft-cited statements of workable guidelines is in Copeland v. United States, 641 F.2d 880, 891 (D.C. Cir. 1980):

> In the private sector, 'billing judgment' is an important component in fee setting. It is no less important [in EAJA-type awards cases]. Hours that are not properly billed to one's client are also not properly billed to one's adversary pursuant to statutory authority.

Included within this notion is the principle that claimants "should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary[.]" Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Excessive hours are those for which a lawyer (or representative) "would not bill a client of means who [is] seriously intent on vindicating similar rights, recognizing that in the private sector the economically rational person engages in some cost benefit analysis." Norman, 836 F.2d at 1301. Finally, Part 826.6(c) of our rules states, in part, that:

> In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the

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of suspension of Captain Scott's pilot certificate is not compensable because of an absence of adversarial proceedings, as required by the Administrative Procedure Act and our own regulations. *See* Barth v. Del Balzo, NTSB Order No. EA-3833 (1993) (discussing 5 U.S.C. §504(b)(1)(C) and 49 C.F.R. 826.3 and concluding that an FAA suspension or revocation order is required before a proceeding is adversarial for purposes of the EAJA). Applicant has not appealed on this point although the law judge set the critical date not as the date of the Administrator's order (March 28, 1991), but as the date of applicant's appeal (April 8, 1991).

administrative law judge shall consider the following:

* * *

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

Applicant criticizes the law judge's allegedly arbitrary method of reducing allowed hours, but a certain amount of hindsight and arbitrariness is inherent in this process short of accepting all of applicant's presentation. Every lawyer who considers a fee application will likely have a different view as to what hours one should not bill a client. Overall, and with some limited exceptions, we think the law judge reasonably attempted to fulfill his obligations under our rules. See, e.g., Application of Docherty, NTSB Order No. EA-4385 (1995). Indeed, we have in the past noted Mr. Konop's tendency toward excessive hours. Application of Nicolai, NTSB Order No. EA-3951 (1993). We decline to overturn the law judge for following our lead.

Although applicant claims the law judge's decision constitutes double punishment under Norman, supra, we disagree.[10]

[10] Billing judgment "must necessarily mean that the hours excluded are those that would be unreasonable to bill a client and therefore to one's adversary irrespective of the skill, reputation or experience of counsel. . . . If it were otherwise, an inexperienced or unskilled attorney would face a double penalty. First, his hourly rate would be lowered and second, his time reduced." Norman, supra, at 1301, citing Hensley, supra.

Even within that construct, we must exclude excessive billings.[11] Id.

c. Additional fees and expenses submitted on appeal. For this appeal, applicant has supplemented the EAJA claim he made before the law judge with additional fees and expenses.

First, applicant asserts that "where Captain Scott did not previously request charges for the fees and expenses associated with Answering FAA counsel's appeal of the underlying decision, those fees and expenses have been requested here." Second Appeal at footnote 93. We deny this additional claim; it is an improper and altogether unjustified attempt to introduce new evidence on a matter that should have and could easily have been presented before the law judge.[12]

Second, applicant has also submitted a claim for fees incurred for the preparation by Mr. Konop of this appeal. For this work, Mr. Konop has claimed a total of 85 hours at a rate of $125/hour. For the reasons discussed above, we will modify Mr. Konop's compensable rate from $125/hour to $95/hour.[13] Eighty-

[11] We will, however, increase the law judge's award for: (1) the 11/19/91 and 11/20/91 case review and hearing hours for Messrs. Konop, Lyon, and Daisey to the amounts applicant originally submitted; and (2) Messrs. Konop and Lyon's hotel bills of $270 for 11/20/91. We agree with the law judge as to the latter item that bills would confirm these expenses. By the same token, however, the law judge did not request substantiation, as he may (49 C.F.R. 826.23), and we are unaware of any case where we have taken such a rigid approach to this or another similar expense.

[12] See Hinson v. Larson, EA-4408, note 7 (1995).

[13] This rate is derived using the law judge's formula (EAJA (continued…)

five hours is a significant amount of time to be expended on this appeal, and we consider some of the work redundant and excessive. For example, the brief contains 15 pages of unnecessary discussion of the merits of the underlying enforcement action. Billing items for "ALJ citation review" and "case and law research" are redundant. Overall, looking at the hours that could reasonably be billed to a client regardless of the skill, reputation or experience of counsel, we will reduce Mr. Konop's allowed hours by one-third.[14]

Third, applicant has not discussed but has submitted a claim for $776 at $125/hr (6.1 hours) for Mr. Konop's work in February and March of 1995, and entitled "FAA Unauthorized Brief." We will authorize recovery at $95/hr for 2 hours (and authorize the $8.50 in expenses). This minor procedural matter did not warrant the hours applicant committed to it, especially in view of the clear precedent giving the law judge considerable procedural discretion.

(…continued)
decision at 19), which we have adopted in light of a lack of better information from applicant. The calculation is as follows: (1995 CPI x 1981 hourly fee cap) ÷ 1981 CPI = 1995 hourly fee cap; 1995 hourly fee cap x 75% = Mr. Konop's compensable rate. Thus, we compute (152.4 x $75/hour) ÷ 90.9 = $126/hour; $126/hour x 75% = $95/hour.

[14] Thus, fees for preparing Applicant's Second Appeal will be compensated in the amount of $4415 (57 hours x $95/hr). Applicant has also submitted a claim for $59.80 in expenses related to this appeal. These costs reflect parking, driving mileage, duplication and postage expenses and are reasonable. We therefore grant this claim.

d. Fees and expenses for Air Line Pilots Association (ALPA). Applicant appeals the law judge's disallowing of all claims by ALPA attorneys Small and Domholt. He claims that the union should be considered a legal aid organization and compensated at prevailing market levels, just as private firm attorneys. He cites our rule, at § 826.6(c) in support of the proposition that this standard should apply where ALPA legal services were provided in furtherance of air safety. On the other hand, the Konop affidavit states that ALPA representation is not a right and was not guaranteed in this case (¶ 8), and that the fees would go to the lawyers, not ALPA ("it was understood that the attorneys would then do whatever they wished with the fees") (¶ 20). In the new billing summaries for Messrs. Domholt and Small (Addenda F and G to Applicant's Second Appeal), it states that the award will go to the attorneys, but that "the attorneys will likely turn any money over to the Air Line Pilots' Association." Union expenses would go to the union. Id.[15]

We agree with the law judge's ultimate conclusion that, in this case, fees and expenses related to ALPA employees should not be recovered. In Devine v. National Treasury Employees Union, 805 F.2d 384 (Fed. Cir. 1986), the court distinguished the general rule awarding prevailing market rates regardless of actual, lower fees and concluded that, if attorneys were salaried employees of the union, if the attorneys were providing prepaid

[15] Applicant does not explain how claimed ALPA paralegal hours would be handled.

legal services, and if the fees went to the union, only the union's costs could be awarded. The basis of this conclusion was the American Bar Association's Code of Professional Responsibility, which requires that prepaid legal services plans derive no profit. Thus, if we consider the ALPA program to be a prepaid legal services plan, as some of applicant's arguments suggest, an award at the basis proposed by applicant is specifically prohibited.

On the other hand, if as applicant alternatively argues the principles of Devine do not apply, we remain unwilling to make an award here. Messrs. Domholt, Small, and Konop do not offer a consistent, complete explanation of their arrangement or of ALPA's official position or expectation. We would, of course, not favor a result where fees were transmitted from applicant to ALPA attorneys personally, with no guarantee they would be turned over to ALPA, if the work was done while on official duty at ALPA. Applicant has had numerous opportunities to offer a full explanation, and clearly was on notice of the need to do so. The most egregious example in this regard is the work ALPA did before Mr. Konop became applicant's representative.[16]

e. Summary of awarded fees and expenses.

For the work prior to the EAJA decision and considered by

[16] Applicant is advised that as to this and any other matter in this decision where our conclusion is based on a lack of proof, we will not consider any further new evidence or explanation, in whatever form, applicant might submit in the future. We have given applicant more than enough leeway.

the law judge, applicant is awarded the amount established by the law judge, with the addition of: $270 in hotel expenses for Messrs. Konop and Lyon; and case preparation and hearing attendance fees for Messrs. Konop, Lyon, and Daisey, respectively, in the additional amounts of $200, $378.18,[17] and $227.52, for a total of $9,180.21 (the law judge's $8,374.51 with the above additions).

For work by Mr. Konop subsequent to the law judge's decision, we award $4,673.30 ($4,415 fees and $59.80 expenses) for the second appeal, and $198.50 for the "Unauthorized FAA Brief," for a total award for this proceeding of $13,853.51.

ACCORDINGLY, IT IS ORDERED THAT:

1. The applicant's appeal is granted to the extent set forth in this decision and is otherwise denied; and

2. The Administrator shall pay the applicant a total of $13,853.51.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[17] In the law judge's recomputation of Mr. Daisey's fees, he apparently unintentionally omitted certain of this amount, intending to omit 1 hour, but omitting 8 hours of fees.